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Washington, DC

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GENERAL COUNSEL
OF COPYRIGHT

In the Matter of _____)
MECHANICAL AND DIGITAL PHONORECORD)
DELIVERY COMPULSORY LICENSE)
_____)

Docket No. RM 2000-7

**REPLY COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION
AND THE SONGWRITERS' GUILD OF AMERICA
IN OPPOSITION TO THE PROPOSED RULEMAKING PROCEEDING
AND IN FAVOR OF CONVENING A CARP TO DETERMINE
THE RATES AND TERMS FOR DIGITAL PHONORECORD DELIVERIES**

In urging the Copyright Office to conduct a rulemaking proceeding, the Recording Industry Association of America ("RIAA"), along with the Digital Media Association ("DiMA") and MP3.com, Inc. ("MP3.com"),¹ seek to enlist the Office to enact a broad legislative agenda in their favor and at the expense of the owners of copyrighted musical works. They seek to minimize their obligation to pay – or to pay nothing at all – for the right to reproduce and distribute copyrighted musical works over the Internet. They seek exemptions from the express statutory obligations in section 115 in order to further their own commercial interests. They seek to have the Copyright Office engage in a laborious and time-consuming exercise of identifying, analyzing and

¹ On May 20, 2001, it was announced that Vivendi Universal, which owns RIAA member Universal Music Group, has agreed to acquire MP3.com in a \$372 million transaction.

classifying still-evolving digital technologies – technologies mutating on a daily basis – with no apparent benefit to consumers of online music.

Moreover, recognizing that such an ambitious rulemaking effort could take many months or even years, RIAA further seeks an interim declaration by the Copyright Office that online music services may bypass the express requirements of the Copyright Act and copy and distribute all the music they want without notifying the copyright owners and without paying them anything.

The relief that petitioners request flies in the face of the express provisions of the Copyright Act, well-settled principles of administrative law and common sense. The Act directs that the royalty rates and terms for the use of copyrighted musical works by online music services – including the distinction between “general” and “incidental” DPDs – be determined in a fact-specific manner through voluntary negotiations or, should those not succeed, by a Copyright Arbitration Royalty Panel (“CARP”). No where in section 115 did Congress provide for interrupting that process to conduct a far-reaching rulemaking proceeding to “clarify” the statute or its terms.

Here and elsewhere, RIAA has asserted that an alleged “lack of clarity” concerning music publishing rights has held up record companies’ entry into the online marketplace. But the reality is otherwise. It is RIAA and its member companies that have themselves held up that process.

At the close of last year, recognizing that negotiations had failed to reach an agreement respecting the licensing of online services, the National Music Publishers’ Association (“NMPA”) and the Songwriters Guild of America (“SGA”) petitioned the Copyright Office to convene a CARP to set the rates and terms for DPDs. This was in keeping with the schedule mandated by the statute and implementing regulations, which

provided a period for voluntary negotiations and a deadline – December 2000 – for the filing of a petition for a CARP. Rather than proceed to a CARP as the statute provides, however, RIAA has sought to have the Office put off the rate-setting proceeding and conduct a prefatory rulemaking of unprecedented scope. The rulemaking proposed by RIAA could easily consume the remainder of the two-year period during which the rates and terms to be determined by the CARP would apply. RIAA’s request would thus delay, rather than facilitate, a determination of what online services should be paying music owners for the use of their works.

NMPA/SGA respectfully submit that the Copyright Office should convene the requested CARP so that the rate-setting process can go forward. Indeed, Congress has so mandated:

“In the absence of license agreements negotiated under [section 115], upon the filing of a petition . . . the Librarian of Congress *shall* convene a copyright arbitration royalty panel” (emphasis added).

17 U.S.C. § 115(c)(3)(D). The Office has no such statutory mandate – or even authority – to conduct the rulemaking proceeding sought by RIAA.

Moreover, to attempt through rulemaking to corral the business models and technologies existing at this moment into a fixed set of rules to be applied to the online services of the future would only serve to increase uncertainty and impede efforts to find marketplace solutions. If anything is certain, it is that the technologies for delivery of music on the Internet will change – very likely at a rapid pace. Business models too will evolve. There is no standard business model for such services today, and the models that will exist when the industry has had some opportunity to mature are not yet known.

Additionally, technology has advanced to the point where any digital distribution of copyrighted music can easily and without detection be captured for permanent use by the recipient – even if the music is delivered in a “streaming” format. Any rules adopted following what would necessarily be a lengthy and involved notice and comment process would likely be outdated by the time they went into effect and could thus prove a hindrance to the developing digital music industry.

RIAA’s brash suggestion that the Copyright Office shortcut the statutory rate-setting mechanism and grant online services an immediate blanket license with no current royalty obligation is untenable and directly at odds with the compulsory licensing provisions of section 115. The blanket license proposal is even less credible in light of RIAA’s related proposal to eliminate summarily the statutory requirement that copyright users provide copyright owners with notice of the use of their works – which would all but guarantee that copyright owners will never receive a penny for the “interim” exploitation of their works. There is simply no basis in law or fact to require that music copyright owners underwrite the record companies in this manner. Indeed, such an action would likely amount to an unconstitutional taking.

For these reasons, NMPA/SGA respectfully urge the Copyright Office to reject the rulemaking petition in its entirety in favor of the voluntary negotiation and arbitration processes that Congress expressly provided in section 115 of the Copyright Act.

I.
**SUCH A SWEEPING RULEMAKING WOULD EXCEED
THE AUTHORITY OF THE COPYRIGHT OFFICE AND
VIOLATE EXPRESS PROVISIONS OF THE COPYRIGHT ACT**

It is true, as RIAA points out, that the Copyright Office issues interpretive rules to aid in the administration of the compulsory licensing provisions of the Copyright Act (RIAA Comments at 26), but this is not what RIAA and other commenting parties seek to have the Copyright Office do here. This is not a question of merely establishing administrative procedures or filling in a single definition that is missing within the statutory framework. Rather, those supporting a rulemaking proceeding have in effect asked the Copyright Office to rewrite substantial portions of the compulsory licensing provisions embodied in section 115.

Section 702 of the Copyright Act permits the Copyright Office “to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under [the Copyright Act].” 17 U.S.C. § 702. There is no suggestion in the Copyright Act that it is the function or duty of the Copyright Office to create a schedule of online business models and technologies and the royalty obligations associated with each of them. Indeed, such rulemaking would be manifestly inconsistent with the statutory scheme embodied in section 115.

As explained in NMPA/SGA’s opening comments, Congress, in enacting section 115, provided a detailed definition for the term “digital phonorecord delivery” (“DPD”). By contrast, Congress chose to avoid creating a static category of business models or technologies to be treated as “incidental DPDs.” Congress did not even employ the term “incidental DPD” in section 115. Rather, Congress expressly directed that any distinction between “digital phonorecord deliveries where the reproduction or

distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery” and “digital phonorecord deliveries in general” be made *in the process of voluntary negotiations or by a CARP*. 17 U.S.C. § 115(c)(3)(C)-(D).

Similarly, while it cannot be disputed that to deliver music online – in streaming form or otherwise – requires the making of multiple, nontemporary copies of the works to be so delivered, the nature and number of server and intermediate copies required to operate a streaming service, and whether such copies fall within the ambit of section 115, are not matters that can be fruitfully debated in the abstract.² Rather, these are questions that are best answered in the context of an actual service.

Congress’ preference for voluntary negotiations and arbitration over regulatory intervention makes sense. Recognizing that the particulars of the online music industry would be evolving at a rapid pace, Congress wanted to ensure that the system was a flexible one. Royalty rates and terms for DPDs are thus to be negotiated by the parties or decided by a CARP based on the actual activities in which the copyright users are engaged. Furthermore, it is only in the course of setting such rates that the parties or CARP are to identify any DPDs that are “incidental” in nature.

² We note that the question whether copyrighted musical works may be reproduced onto computer servers to operate an online service without obtaining a license from the copyright owners has already been answered by a federal court – in the negative. *TeeVee Toons, Inc. v. MP3.com, Inc.*, No. 00 Civ. 3951 (JSR), 2001 WL 290063 (S.D.N.Y. Mar. 26, 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), *later proceeding*, No. 00 Civ. 0472 (JSR), 2000 U.S. Dist. LEXIS 13293 (S.D.N.Y. Sept. 6, 2000). That court, of course, had the benefit of actual facts to guide its analysis.

A. The Copyright Office Cannot and Need Not Rule On Myriad Aspects of Streaming Technology

RIAA's and other parties' request for rulemaking by the Copyright Office concerning the legal status of streaming activities, including whether such technologies are exempt from licensing under section 115, well illustrates why the Copyright Office should instead stay its hand.

It is readily apparent from the Copyright Office's Notice of Inquiry ("Notice") and the first round of comments that the proposed rulemaking could not be confined to the discrete questions whether streaming or "limited" downloads constitute "incidental" DPDs under section 115. To examine these issues necessarily would give rise to a plethora of subissues and additional concerns, many identified in the Notice.

Indeed, on the streaming question alone, the Notice queries:

Are some or all the copies of a musical work made that are necessary to stream that work incidental DPDs? If temporary copies can be categorized as incidental DPDs, what is the definition of "temporary"? Some "temporary" copies may exist for a very short period of time; others may exist for weeks. Is the concept of a "transient" copy more relevant than the concept of a "temporary" copy? If fragmented copies of a musical work are made, can each fragment, or the aggregation of the fragments of a single work, be considered an incidental DPD? If a fragmented copy can be an incidental DPD, does it make a difference in the analysis whether the copy is temporary or is permanent? Aren't incidental DPDs subject to section 115's definition of digital phonorecord deliveries? If so, does the requirement that a DPD result in a "specifically identifiable" reproduction by or for a transmission recipient rule out some of the copies discussed above from consideration as incidental or general DPDs?

Notice, 66 Fed. Reg. 14099, 14101-02 (Mar. 9, 2001).

Thus, the Copyright Office raises a host of questions and the parties have raised – or would raise – many more. But these are not questions that can properly be

answered in a notice and comment proceeding divorced from specific facts and circumstances. Indeed, many might never *have* to be addressed to determine royalty rates and terms for particular online services.

An adequate examination of the myriad issues raised by the Office and commenting parties concerning streaming alone would require voluminous testimony and documentary evidence regarding technological advances in distribution of digital music, as well as the economics of this emerging industry. For example, music publishers could and would submit evidence to demonstrate that various streaming software, including the widely used Windows Media player, make complete and accessible copies of streamed recordings on consumers' hard drives. Moreover, NMPA/SGA would show that there is widely available software such as Total Recorder that permits end users to capture complete copies of files streamed to their computers.³ The difference between "streaming" and the transmission of what is commonly referred to as a "full DPD" has thus collapsed to the point that it is illusory.⁴

Aside from the technological debate, wholly ignored by RIAA and the other commenting parties is the economic impact of interactive streaming services on music owners. In the era of the celestial jukebox, consumers will no longer be buying as many CDs. A decline in CD sales is, of course, rendered still more likely by the fact that consumers have the capability to capture permanent files of the music streamed to them through such services. Certainly in considering the legal status of streaming, the

³ Total Recorder is available for purchase over the Internet for \$11.95. *See* <http://www.totalrecorder.com/> (visited May 22, 2001).

⁴ In light of the technological realities, DiMA's position that streaming does not involve the making of DPDs (*see generally* DiMA Comments) lacks all credibility.

Copyright Office would have to consider its potential to displace sales of physical phonorecords and even DPDs.⁵ But how can the economics of streaming possibly be analyzed apart from an understanding of the particulars of the music subscription services that will offer it?

RIAA acknowledges that the rulemaking proceeding it envisions, in addition to involving written comments and public hearings, might need to include “consultations with the affected industries.” (RIAA Comments at 17 n.5.) This is an understatement to say the least. To develop an adequate evidentiary record upon which the Copyright Office could act would in fact require, at a minimum, an opportunity for interested parties to present testimony from experts in the music publishing, recording and online services industries, as well as in business, economics and computer technologies. This testimony would need to be tested through examination by the Copyright Office and the interested parties. Finally, the Copyright Office – which, of course, is not a tribunal or a congressional committee – would have to consider and weigh the conflicting evidence to arrive at conclusions of fact and law.⁶ By the time the

⁵ See S. Rep. No 104-28, at 15 (1995) (explaining that in enacting the Digital Performance Rights in Sound Recordings Act of 1995 (“DPRSRA”), Congress was cognizant of concerns “that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for the use of their work.”).

⁶ On appeal, a court will invalidate a rule that is not adequately supported by evidence in the record. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). In *State Farm*, the Supreme Court invalidated NHTSA’s revocation of a rule requiring passive restraints when the agency failed to consider evidence regarding air bags. *Id.* at 46-48. Likewise, in *Bowen v. American Hospital Assoc.*, the Supreme Court made it clear that *State Farm* did not apply solely to rule revocations. 476 U.S. 610, 626-27 (1986). The Court invalidated a regulation by the Department of Health and Human Services concerning procedures relating to health care for disabled infants on the ground that it was not a reasoned action by the

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Copyright Office had satisfactorily completed the undertaking (if it could), many of its findings would be obsolete because they would be based upon outdated facts and assumptions.

Such a wide-ranging “rulemaking” proceeding is wholly without precedent and would exceed the powers delegated to the Copyright Office.⁷ Moreover, to engage in such an exercise would consume an inordinate amount of time and would not be an efficient use of the parties’ resources – resources that would be better spent addressing the rates and terms for the actual services, *i.e.*, MusicNet and Duet, that the record companies purportedly seek to launch in the near future. Rather than resolve their licensing issues in the real world by focusing on the negotiating process or proceeding to

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agency. *Id.* (“Our recognition of Congress’ need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision . . .”).

⁷ As explained in our previous submission, *Satellite Broadcasting and Communications Assoc. v. Oman*, 17 F.3d 344 (11th Cir. 1994) and *Cablevision Systems Development Co. v. Motion Picture Assoc. of Am., Inc.*, 836 F.2d 599 (D.C. Cir. 1988), cited by RIAA, do not remotely begin to address the type of rulemaking sought herein by RIAA and other commenting parties. In *Satellite Broadcasting* the technology was well understood, which left to the Office the relatively straightforward task of interpreting the relevant statutory provision to provide a legal answer to the question whether Congress had intended satellite broadcasters to be exempt from the compulsory license scheme. 17 F.3d at 348. In *Cablevision*, the Copyright Office made an administrative determination of how “gross receipts” should be calculated under section 111 of the Copyright Act. 836 F.3d at 606. Notably, in *Cablevision*, section 111 expressly provided that the Register of Copyrights *should* prescribe regulations in this area. Likewise, the rulemaking conducted by the Copyright Office concerning AM/FM signals transmitted over the Internet involved the application of an express statutory exemption to a well-defined activity. 65 Fed. Reg. 77292 (Dec. 11, 2000). As in *Satellite Broadcasting* and *Cablevision*, the Office was not required first to examine and make factual findings concerning a whole host of activities to which its rules potentially could apply. Finally, in none of these matters was the Copyright Office engaging in wholesale amendment of the Copyright Act, as would be the case here.

a CARP, however, the record companies inexplicably prefer to create their own regulatory roadblock.

B. “Limited” Downloads Are Simply DPDs for Which the Record Companies Seek a Discount

RIAA and DiMA purportedly seek “clarification” from the Copyright Office concerning the legal status of “limited” downloads transmitted to consumers to be available for a certain period of time or a certain number of uses. RIAA evidently does not dispute that “limited” downloads are transmitted as complete downloads and thus meet the definition of a DPD as set forth in section 115. Rather, RIAA asks the Copyright Office to further classify such full downloads as “incidental” DPDs or as DPD “rentals.”

The actual question here is not one of statutory interpretation but of economics. What RIAA ultimately seeks is a discounted royalty rate for “limited” downloads. Once again, this is exactly the type of issue that Congress contemplated would best be resolved through voluntary negotiations or arbitration. Even if it had the authority, it would be an absurd waste of effort for the Copyright Office to engage in a protracted exercise to decide upon a label for “limited” downloads when the real question is how much copyright owners should be paid for this use of their music.

As with streaming, the particular services and business models involved are critical to a determination of rates and terms for “limited” downloads. How long or for how many uses will the “limited” downloads be available? Will an end user’s renewal of his or her subscription to the service extend the availability of the song? Obviously, a consumer’s ability to access a recording three times or for three days has different economic implications than a download that will be available indefinitely so long as that consumer continues to subscribe to the service.

